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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ROBLEDO, Defendant and Appellant.	2d Crim. No. B287234 (Super. Ct. No. 2002029776) (Ventura County)

Daniel Robledo appeals from a postjudgment order denying his motion under Penal Code[1] section 1473.7 to vacate his 2002 no contest plea conviction of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)). Appellant contends the motion should have been granted on the ground that his trial attorney provided ineffective assistance by misadvising him regarding the immigration consequences of his plea. We conclude that the motion was properly denied on the asserted grounds. We

[1] All statutory references are to the Penal Code unless otherwise stated.

remand, however, for further proceedings in light of recent amendments to section 1473.7 that went into effect on January 1, 2019.

FACTS AND PROCEDURAL HISTORY

Appellant is a Mexican citizen. In 1987, when appellant was five years old, he moved to the United States with his family. In August 2002, he was stopped for driving a vehicle with tinted windows. He told the police he did not have a driver's license and was arrested and searched. During the search, the police found a bindle of cocaine in appellant's pocket. Appellant also showed signs of being under the influence of cocaine and admitted he had recently used the drug.

Appellant was charged in a felony complaint with one count of possessing cocaine (Health & Saf. Code, § 11350, subd. (a)), one misdemeanor count of being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and one misdemeanor count of driving without a license (Veh. Code, § 12500, subd. (a)). In November 2002, he pled no contest to the possession charge with the understanding he would be eligible for probation and drug treatment diversion under Proposition 36.

On his change of plea form, appellant initialed a statement providing that "[i]f I am not a citizen, I could be deported, excluded from the United States or denied naturalization. (Pen. Code, § 1016.1.) If I am not a citizen and am pleading guilty to an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, or under certain circumstances a moral turpitude offense, I will be deported, excluded from the United States, and denied naturalization. (8 U.S.C. §§ 1101(a)(43), 1182, 1227.) "Appellant and his attorney also affirmed that counsel had explained the direct and indirect consequences of appellant's

plea and that appellant understood those consequences. During his plea colloquy, appellant answered in the affirmative when asked if he understood that "if you are not a citizen you could be deported, excluded from the United States or denied naturalization."

The court accepted appellant's plea, suspended imposition of sentence, and placed him on three years of probation pursuant to Proposition 36. The two misdemeanor counts were dismissed. In 2004, appellant successfully completed his probation and the case was dismissed pursuant to section 1210.1.[2]

In 2012, appellant was notified that deportation proceedings had been instituted against him as a result of his conviction for possessing a controlled substance. In 2017, he filed a motion to vacate his conviction under section 1473.7. The motion contended that appellant's plea counsel had provided ineffective assistance by failing to advise him regarding the immigration consequences of his plea and failing to seek an immigration-neutral plea deal on his behalf. In support of the motion, appellant submitted a declaration stating that counsel "advised me that the case would be dismissed under Prop. 36 and

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[2] Appellant's case was dismissed under section 1210.1, former subdivision (d)(1), which provided in pertinent part that "[a]t any time after completion of drug treatment, a defendant may petition the sentencing court for dismissal of the charges. If the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment . . . or information against the defendant. In addition, . . . both the arrest and the conviction shall be deemed never to have occurred."

drop off my record after completing the drug program." Appellant added that he and his attorney "never discussed anything relating to immigration" and that counsel "never explained to me that I would be deported because of this controlled substance conviction." He "was surprised" that deportation proceedings had been instituted against him because he "thought that Prop. 36 eliminated the conviction as [his] attorney said it would be eliminated."

The People opposed the motion, asserting among other things that appellant had failed to meet his burden of proof by failing to include a declaration from his plea counsel. In denying the motion, the trial court found that appellant had not met his burden of proving "there was prejudicial error damaging his ability to understand, defend against, or knowingly accept actual or potential adverse immigration consequences." The court added: "I put a lot of weight into the fact that [appellant] . . . initialed the box that talked about not only could there be immigration consequences, but in a case involving controlled substances there absolutely could be. And I think to come forward now and say that I really didn't know so I didn't talk to my attorney about that doesn't meet the burden that I think the law lays out."

DISCUSSION

Appellant contends the trial court erred in denying his motion to vacate his conviction under section 1473.7. We conclude the motion was properly denied on the asserted grounds of ineffective assistance, but remand for further proceedings in light of recent amendments to section 1473.7.

Section 1473.7 provides in pertinent part: "A person who is no longer in criminal custody may file a motion to vacate a

conviction or sentence [if] . . . [t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (*Id.*, subd. (a)(1).) The statute "allows a defendant, who is no longer in custody, to challenge his or her conviction based on a mistake of law regarding the immigration consequences of a guilty plea or ineffective assistance of counsel in properly advising the defendant of the consequences when the defendant learns of the error postcustody." (*People v. Perez* (2018) 19 Cal.App.5th 818, 828.) The burden is on the defendant to show, by a preponderance of the evidence, that he or she is entitled to the requested relief. (*Id.* at p. 829.)

"Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. [Citations.]" (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75) (*Ogunmowo*).

In reviewing appellant's claim, "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the

defendant." (*Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76, citing *In re Resendiz* (2001) 25 Cal.4th 230, 249 (*Resendiz*).)

"In ruling on a motion to withdraw a plea, the trial court may take into account the defendant's credibility and his or her interest in the outcome of the proceedings. [Citation.] We will defer to a trial court's credibility determinations that are supported by substantial evidence. [Citation.]" (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.)

To establish the requisite prejudice resulting from counsel's misadvice or failure to advise regarding the immigration consequences of his plea, a defendant must demonstrate "a reasonable probability . . . that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial. [Citations.]" (*Resendiz*, *supra*, 25 Cal.4th at p. 253; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693].) A defendant's assertion that he would not have pled guilty but for counsel's misadvice or failure to advise regarding the immigration consequences of the plea "'must be corroborated independently by objective evidence.'" (*Resendiz*, *supra*, 25 Cal.4th at p. 253.)

"'Surmounting *Strickland*'s high bar is never an easy task,' [citation], and the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas.' [Citation.] Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States* (2017) — U.S. — [198 L.Ed.2d 476, 487] (*Lee*).) In determining whether prejudice has been established in this context, courts must consider the

likelihood of success at trial, the potential consequences after a trial compared to the consequences flowing from the guilty plea, and the importance of immigration consequences to the defendant. (See *id.* at pp. __ - __ [*id* at pp. 485-487].)

Appellant offered no contemporaneous objective evidence to support his assertions that (1) counsel failed to advise him or misadvised him regarding the immigration consequences of his plea, or (2) he would not have entered his plea and would have insisted on going to trial had counsel properly advised him regarding those consequences. Although he offered his own declaration, the "*post hoc* assertions" contained therein were insufficient to establish he was entitled to relief under section 1473.7 on the ground of ineffective assistance of counsel. (See *Lee*, *supra*, __ U.S. at p. __ [198 L.Ed.2d. at p. 487].) His motion to vacate his conviction on that ground was thus properly denied. (*Resendiz*, *supra*, 25 Cal.4th at p. 254.)

As the People note, however, appellant is entitled to the benefit of recent amendments to section 1473.7 that went into effect while this appeal was pending. Effective January 1, 2019, section 1473.7, subdivision (a)(1) now provides in pertinent part that a person no longer in criminal custody may move to vacate a conviction or sentence as "legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendre. *A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.*" (Emphasis added.) The statute was further amended to provide that "[t]here is a presumption of legal invalidity for the purpose of paragraph (1) of subdivision (a) if the moving party pleaded guilty or nolo

contendre pursuant to a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred, where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences." (§ 1473.7, subd. (e)(2).)

The trial court denied appellant's motion after finding he had failed to meet his burden of proving ineffective assistance of counsel. As section 1473.7 now makes clear, however, a finding of ineffective assistance of counsel is no longer a prerequisite to relief under subdivision (a)(1) of the statute. Moreover, it would appear that appellant is also entitled to the presumption of legal invalidity set forth in subdivision (e)(2) of section 1473.3. Accordingly, we shall remand for further proceedings.[3]

DISPOSITION

The trial court's order denying appellant's section 1473.7 motion to vacate his conviction on the ground of ineffective assistance of counsel is affirmed. The matter is remanded for further proceedings on appellant's motion in light of the amendments to section 1473.7 that went into effect on January 1, 2019.

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[3] The dissent asserts that section 1473.7, subdivision (e)(2) is unconstitutional. Because the constitutionality of the statute is not challenged by either party, we need not—and should not—address the issue. (See *In re R.S.* (2017) 11 Cal.App.4th 239, 246, quoting *California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 442 [recognizing that "'[c]ourts should follow a policy of judicial self-restraint and avoid unnecessary determination of constitutional issues.'"].)

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PERREN, J.

I concur:

TANGEMAN, J.

YEGAN, J., Dissenting:

I respectfully dissent. In its apparent zeal to fend off federal immigration authorities, the Legislature has run roughshod over the separation of powers principle of government. Even though it has limited its pronouncement to a narrow circumstance, it declares that a Superior Court judgment, entered almost twenty years ago, is "presumptively invalid." (Pen. Code, § 1473.7, subd. (e)(2).)[1] Factually, how could the Legislature know this? Legally, since statehood or at least since the 1929 opinion of *Coleman v. Farwell* (1929) 206 Cal. 740, there has been a presumption of the correctness of a Superior Court judgment. (See, e.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) To give section 1473.7, subdivision (e)(2) our imprimatur blurs, if not erodes, the separation of powers principle of our government.

There is no precedent here because the Legislature has never reached-out so far. The sweep of the statute is so broad it is nonsensical. It would include even the atypical defendant who either accepts deportation or who wants it. Even if the Legislature's goal is a good one, its choice of language denigrates the Superior Court. Our Superior Court judges daily, and painstakingly, take guilty pleas from defendants who are subject to federal immigration laws. This is solemn and serious work. To even hint that their judgments are "presumptively invalid" is not appropriate.

Section 1473.7, subdivision (e)(2), when applied on appeal, is at variance with the California Constitution article VI, section 13, which dictates affirmance absent a defense showing of a miscarriage of justice. (See also Code Civ. Proc., § 475; 9 Witkin,

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Cal. Procedure (5th ed. 2008) Appeals, § 355, p. 409.) As expressly indicated by our Supreme Court, the presumption of correctness is "an ingredient of the constitutional doctrine of reversible error. [Citations.]" (*Denham, supra,* 2 Cal.3d at p. 564.) This constitutional provision cannot be altered by statute. (*People v. Navarro* (1972) 7 Cal.3d 248, 261; *Consulting Engineers and Land Surveyors of Calif. v. Prof. Engineers in Calif. Gov't.* (2007) 42 Cal.4th 578, 588.) I cannot, consistent with the oath of office, accept the Attorney General's concession that appellant is entitled to remand.

The judiciary has an obligation and duty to honor the separation of powers principle of government. Here, the Legislature purports to exercise judicial power by declaring a presumptively valid Superior Court judgment to be "presumptively invalid." It is not permitted to do so. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472.)

A defendant who pleads guilty will obviously try to avoid or minimize the immediate consequences of criminal conviction. If he is not a citizen of the United States, he may be concerned with immigration consequences, but only secondarily. The reality is that a defendant who is charged with a felony subjecting him to a prison term is more concerned about immediately getting on the prison bus than he is about getting on the immigration bus at some future date. There is a further reality. This long final plea, if vacated, severely prejudices the People who will find it difficult, if not impossible, to now prove the case.

The present record is more than adequate to support the order denying relief. The trial court did not believe appellant. This is an adverse factual finding. Absent an attorney declaration where counsel falls on his or her sword, I cannot

imagine what greater evidentiary showing can be made by appellant. No competent attorney would advise a state court defendant that a no contest plea, even if vacated upon completion of diversion, would bind the Federal government and preclude deportation. In his written plea, appellant acknowledged that he was pleading to "a controlled substance offense" and "I will be deported." (See maj. opn. at p. 2.)

Even with benefit of hindsight, I am hard pressed to see what additional advisements, acknowledgments, and waivers could have been undertaken. And just what does the Superior Court do today to avoid the presumption of invalidity?

If section 1473.7, subdivision (e)(2) is valid, and I do not believe that it is, appellant's signature from the written negotiated disposition has now been erased. The solemn and serious Superior Court plea proceeding now has a trick or surprise ending reminiscent of an O'Henry short story.

I would declare section 1473.7, subdivision (e)(2) unconstitutional and deny further relief.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

Ryan J. Wright, Judge
Superior Court County of Ventura

Michael K. Mehr for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.